In the Supreme Court of the United States.

OCTOBER TERM, 1897.

THE GUTHRIE NATIONAL BANK,
Plaintiff in Error and Appellant

AGAINST

THE CITY OF GUTHRIE,
Defendant in Error and Appellee.

No. 412

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF FACTS.

The Congress of the United States in opening Oklahoma Territory to settlement in the year 1889 established no law for the government of the citizens settling in that country. So far as local law regulating the rights of citizens and the political organization of the communities are concerned, it was vacuity. On the 22nd day of April, 1889, from twelve to fifteen thousand people located upon and from thence inhabited the present boundaries of the

City of Guthrie, and upon the same date there were organized by the voluntary assent of the people four distinct provisional municipal corporations, denominated Guthrie, East Guthrie, Capitol Hill and West Guthrie, comprising three hundred and twenty acres each. These provisional city organizations were created by the assent of these inhabitants and continued from that time until August, 1890. They exercised all of the powers that, and even more than the law usually delegates to municipal corporations for the purpose of local self-government. They made public improvements, graded streets, erected buildings, constructed bridges, adopted laws and ordinances, and arrested, punished and imprisoned violators of such ordinances. They maintained public schools and regulated the right of possession of the various claimants to town lots within their respective boundaries and heard and determined the rights of the respective claimants to the possession of the lots and who was the first settlers and occupants of such lots and issued certificates of such fact from the local tribunal constituted by the municipal authorities to hear and determine such questions, which certificates were given the force of conclusive evidence by the Oklahoma Townsite Act of May 14, 1890, 26 Stat. at L., p. 109, sec. 2, where there is no contest, and prima facie evidence of right to the lot where the right of the claimant is disputed by some other claimant. These provisional municipal govern-

ments continued to exercise all of these functions until the month of August, 1890, when they were consolidated and organized as a village corporation under and pursuant to the laws of Nebraska as adopted and extended over said Territory by its organic act approved May 2, 1890, at which time the municipal government of the village of Guthrie succeeded to all of the improvements, property, books and documents of the several provisional governments and continued to use the streets, sidewalks and other public improvements made by such provisional governments.

During the existence of the several provisional governments they each contracted and created, in various ways pertaining to their municipal affairs, certain debts which remained unpaid at the time the said provisional governments were converted into a legally constituted municipal corporation. The village of Guthrie continued her corporate existence until after the adjournment of the first territorial legislature, when she organized as a city of the first class under the laws of the Territory of Oklahoma, and has ever since remained such, with a mayor, common council and police officers, exercising all of the functions and powers of a municipal corporation. It is composed of the same people, and embraces the same territory as the original provisional governments.

During the session of the first legislative as-

sembly of the territory, an act was passed entitled, "An act for the purpose of providing for the allowance and payment of the indebtedness heretofore created by the people of the cities of Guthrie, East Guthrie, West Guthrie and Capitol Hill, now consolidated into the village of Guthrie." (Chap. 14, Art. 1, Stat. of Okla. 1890). For copy of such act, see Appendix number one of this brief.

Pursuant to the provisions of this act, on the ninth day of March, 1891, the Judge of the District Court of Logan County, Oklahoma Territory, made and entered an order on the journal of said court appointing a commission composed of John Foster, M. D. Losey and A. J. Diehl, to perform the duties prescribed by the statute referred to, who proceeded according to the statute, heard and determined the various claims presented upon account of the four provisional municipal governments, and made their reports to the district court (see printed record, p. 2). Such report was filed about the first day of September, 1891, and found in favor of the allowance of certain claims held by the Guthrie National Bank, aggregating four thousand, three hundred fifteen and 22-100 dollars, whereupon the Guthrie National Bank, on the seventeenth day of March, 1893, filed its petition and motion to confirm the report with respect to the claims held by it (see printed record, p. 13). On the seventh day of April, 1893, the City of Guthrie filed its exceptions to the report

upon numerous grounds which remained undisposed of until the making of the order from which this appeal is taken, hereinafter referred to.

Subsequently and on the twenty-eighth day of March, 1896, the City, by its attorney, moved to dismiss the entire proceeding and each and every claim audited and allowed by the claims commission, upon the ground that the law under which said proceedings were had is null and void. To this motion is attached a schedule of the various claims affected thereby, in which the several claims of the Guthrie National Bank are included (see printed record, pp. 16-28, inclusive.)

On the second day of April, 1896, the court sustained the motion to dismiss upon the grounds of the invalidity of the law authorizing the appointment of the commission and charging the village of Guthrie with the payment of the claims audited by such commission. (See printed record, pp. 28 and 29.)

From this decision the Guthrie National Bank appealed to the Supreme Court of the Territory by petition in error. The case, on the eleventh day of June, 1897, was heard in the Supreme Court of the Territory and the judgment of dismissal entered by the court below affirmed. The case is transferred to this court by both appeal and writ of error.

THE JUDICIAL HISTORY OF THE CONTROVERSY.

In 1892 Marquis D. Losey, one of the Commissioners appointed by the Judge of the District Court of Logan County to audit the claims of the provisional municipalities, by order of the District Judge was awarded his compensation, under section five of the act authorizing their appointment, and the City refusing to pay to Losey the amount fixed as his compensation, he applied to the District Court for a writ of mandamus, which was awarded, and from this order the City appealed to the Supreme Court of the Territory, and there presented the claim that the law charging the City or Village of Guthrie with the payment of the claims in question is unconstitutional. The court, by Burford, J., rendering an elaborate opinion, held to the contrary. The tenor of this opinion is to the effect that the provisional governments could not bind themselves or others by their contracts, but that it did create a moral obligation on the part of the inhabitants, which affords a sufficient consideration to authorize the legislature to charge the taxpayers of such municipality therewith; that such act is not special legislation, within the act of July 30, 1886 (24 Stat, at L., ch. 918) nor does it violate the limitation placed by that act upon the power of municipalities to become indebted. This opinion

is found at Vol. 1 of the Oklahoma Reports, page 188.

The validity of this law next came into question in the Supreme Court of the Territory in the case of the City of Guthrie against the New Vienna Bank, 4 Okla. 196. One of the claimants, the New Vienna Bank, was a claimant before the Claims Commission, and its claim was included in the list of claims which the Commission allowed and reported to the court. Objection was made to this claim and it was placed on the trial docket of the court and a trial thereon had, the court finding in favor of the Bank and rendering judgment affirming the validity of the claim against the City and entering an order directing the City to pay the same. The validity of this law was affirmed and the grounds of the decision in the Losey case, which was rendered by the same justice, affirmed except upon one point, on which that case was overruled, and the law declared invalid, viz.: it was held that the fourth section of the act of congress of July 30, 1886 (24 Stat. at L., p. 170) prohibits cities from becoming indebted, either voluntarily or involuntarily, in excess of four per cent. of the taxable value of its property, and as there had never been an assessment and no rule in force for the measurement of its taxable property, it was incompetent for either the legislature or the city to impose or create a debt upon such municipality; and the case of Territory, ex rel. Losey against the City of Guthrie, supra, in so far as it attempts to make a distinction between

debts imposed by the legislature and debts created by the City, is overruled.

An application for a rehearing was presented and argued, which was subsequently overruled on the authority of the cases hereinafter referred to; but, in the meantime, in the cases of Hoffman vs. the Board of County Commissioners of Pawnee County, 3 Okla. 325, and Sauer vs. McMurty, 4 Okla. 447, the ruling in the New Vienna Bank case was overruled and there held that a municipality is capable, under the act of congress above referred to, of creating an indebtedness previous to the time of making any assessment.

The next case adjudged by the Supreme Court of the Territory is the case of the City of Guthrie vs. W. D. Wylie, et al., decided September 4, 1896. The opinion is not yet published, but a copy set out in Appendix number two to this brief. In that case Wylie and others obtained from the provisional city government, in December, 1889, a franchise for the construction of a street railway. One of the conditions of the ordinance granting such franchise required a deposit with the treasurer of said city of a check for the sum of one thousand dollars, which check was deposited to become forfeited to such provisional city if the grantees in the ordinance should fail to construct the railway. After the passage of the organic act of the Territory putting a code of laws in force whereby the city might become organ-

ized, the check was converted into money and deposited with the treasurer of the provisional city Subsequently the provisional government declared a forfeiture of the rights assumed to have been granted by the ordinance and the money was used for the benefit of such provisional city, which appropriated the benefit of its expenditure: Held in this opinion that the provisional city government did not become a *de facto* corporation upon the passage of the organic act which put in force the laws of the State of Nebraska in the Territory of Oklahoma, and which did not operate to breathe the breath of life into the provisional municipal government as a corporation *de facto;* and held that the liability of the provisional city was not transmitted to the *de jure* village of Guthrie nor to its successor, the city of Guthrie. This case was an independent suit brought by Wylie to charge the city of Guthrie with the liability for the money received and it does not appear that he pursued the statutory method of presenting his claim to the claims commission.

The next judicial phase arose in Martin, Mayor, et al., vs. The Territory of Oklahoma, ex rel W. H. Gray, 5 Okla. 188, which was a case in which Gray, as receiver, representing certain of the provisional city indebtedness, after trial in the district court and after an order sustaining such indebtedness and directing the issuance of the warrants in conformity to the law, and after the city authorities had

issued such warrants in conformity to the order of the court and refused to levy a tax to pay the same, procured an alternative writ of mandamus in the Supreme Court of the Territory seeking to compel the levy of such tax, and the city answered that at the date of the issuance of such warrants in conformity to such order of the court, the city, as a municipality, was already indebted in a sum greater than four per cent. of its taxable property, as shown by the last preceding assessment for the purposes of territorial and county taxation. This was adjudged to be a complete answer to the writ. The court overlooked the fact that the question had been once regularly adjudicated in the proceedings where the final judgment was rendered establishing the indebtedness of Gray as a valid claim against the city and directing the warrants to issue, and apparently overlooking the fact that the measure of the limitation should be applied at the date of the creation of the indebtedness rather than at the date of its being evidenced in a form contemplated by law.

The next case is the Guthrie National Bank vs. A. M. McElHinney, Mayor of the City of Guthrie, 5 Okla. 107, an original proceeding in mandamus to enforce the issue of warrants in conformity to the order of the court approving the findings of the Guthrie Claims Commission upon certain warrants and directing their issuance. The case was tried and a peremptory writ granted and the city appealed to the supreme court. This decision is important as ex-

pressing the last views of the supreme court of the Territory upon this question. It entirely overlooked the fact that the constitutional authority of the legislature to enact the law was merged in a judgment affirming the validity of the claim and that the mandate sought was for the purpose of enforcing a judgment of a court of record fixing and establishing a liability, and that the time to have asserted the unconstitutionality of the law was before the rendition of that judgment in the court below. Be that as it may, the opinion is significant as expressing the last views of the court upon the validity of the law. We incorporate that portion of the opinion announcing the views of the Supreme Court of the Territory herein:

"We do not think that legislative authority can under any circumstances go farther than to authorize municipal corporations to assume such liabilities, and to make such payments or claims incurred by such municipal corporations or their legal or *de facto* predecessors, if they see fit to do so; but the provisional governments were organized without authority of law and in the absence of any law authorizing the incorporation of any municipality, and the liabilities incurred were therefore personal liabilities upon those only who incurred them, and they could not in law, equity or reason, be construed into liabilities upon the municipalities which ensued and which became such under the law, when the law authorizing the creation of municipal corporations came afterward to be enacted.

"The obligations incurred were personal only and were in no sense of such a character as to be devolved upon the subsequent municipalities. Even if the liabilities were of such a character as that the

legislature might have authorized their payment, we do not think that the method adopted was such as to affix and determine such liability in the absence of a provision enabling the municipalities to have their day in court, to avail themselves of the right of jury trial, and of the right to an appeal from the awards made, nor do the provisions of the statute in question constitute that due process of law, to which the city, as other persons, is entitled. (Oklahoma City vs. Richardson, 3 Okla. page 5; State ex rel McCurdy vs. Tappan, Town Clerk, etc., 29 Wis. 664; Atkins vs. Town of Randolph, 31 Vermont, 226; County of Hampshire vs. County of Franklin, 16 Mass. 76; People, ex rel McCagg vs. Mayor, etc., 51 Ill. 17.)

"The subject was fully considered at the September term of this court, and passed upon in the case of the City of Guthrie vs. Wylie et al., and the views there expressed, are here adopted and reaffirmed."

It will be observed that the ruling in the present case is based upon the ruling in the case of Bank vs. McElHinney and in the case of Martin vs. Gray, and that no written opinion was filed in the present case. We therefore trust to be pardoned for setting out elaborately the judicial history of the controversy.

ARGUMENT.

The learned court below erred in assuming the date of the issuance of the warrants instead of the date of the law fixing the liability of the city for the payment of the debts of the provisional governments, as the time when the limit provided by the act of July 30, 1886, of four per cent. on the taxable value of the municipality should have applied nor does the act presume to create a debt upon the municipal-

ity affected by the limit imposed by the act of congress of July 30, 1886.

Keil vs. South Bend, 22 C. C. A. 618, 79 Fed. R. 921.

Commissioners vs. Goshen, 165 Ill. 17.

Commissioners vs. Reeves, (Ind.), 46 N. E. R. 995.

City of Clinton vs. Williker, (Ia.), 68 N. W. R. 431.

Thompson vs. School Dist., (Ia.), 70 N. W. R. 1093.

State vs. City of Great Falls, (Mont.), 49 Pac. R. 15.

Keeley vs. Minneapolis, (Minn.), 65 N. W. R. 115.

Kansas City vs. Ward, (Mo.), 35 S. W. R. 600.

The court erred in its conclusion that it was incompetent for the legislature to impose the liabilities created by the provisional governments upon the *de jure* municipalities succeeding to the benefits of the material and social betterments of the community created by those provisional governments. See:

Territory ex rel Losey vs. The City of

Guthrie, 1 Okla. 188, page 12, and authorities there collected and cited;

Also,

Simonton Municipal Bonds, sec. 260;

Read vs. Plattsmouth, 107 U. S. 568;

Ewell vs. Daggs, 108 U. S. 151;

Sherman Co., vs. Simons, 109 U. S. 739.

The court erred in its assumption that no right of appeal is provided from orders of allowance made by the district court. By section 8, article 24, chapter 70, paragraph 4656, of the Code of Civil Procedure of the Territory, which took effect December 25, 1890, it is provided that "appeals may be taken from the district courts to the supreme court, by either party, from all final orders and judgments." In section 9 of the organic act of the Territory it is provided: "Writs of error, bills of exception and appeals shall be allowed in all cases from final decisions of said district courts to the supreme court, under such regulations as may be prescribed by law, but in no case removed to the supreme court shall trial by jury be allowed in said court." There is nothing in the act charging *de jure* municipalities with the debts of the provisional government prohibiting appeals from orders of the district court, and the assumption that the appeal must be ex-

pressly provided for in the face of the organic law of the Territory and of the general laws of the Territory on the subject in order to entitle a party to an appeal from a final order, carries its own refutation.

The court erred in holding that the constitutional right of trial by jury is infringed. The act simply remits the proceedings to the district court for further proceedings upon the filing of the report of the referees and does not exclude the final trial of the validity of any such claim by jury, and if it were otherwise it would not affect the validity of the law.

Black's Const., L., p. 448;

Dunmore's Appeal, 52 Pa. St. 374;

Darlington vs. Mayor, 31 N. Y. 164;

McElrath vs. U. S., 102 U. S. 426.

Even were it otherwise and the City were entitled to a trial by jury the same as an individual litigant and its personal status came within the constitutional guaranty, the subject matter of the litigation is not embraced therein, because it is a statutory proceeding unknown to the common law and equitable in its character.

There may be debts claimed under the proceedings in the District Court upon which the claim of benefit conferred upon the *de jure* city or its inhabitants is too shadowy to justify the legislature in im-

posing the burden of their payment upon it. That is not the question presented here. That is for the court below to deal with in respect to the merits of each individual claim. The effect of the ruling complained of is that the legislature can impose no such claim no matter how meritorious, no matter how direct and capable of measurement those benefits may be. In this we submit the learned court below erred and that there is no constitutional objection to the passage and enforcement of the law in question.

Respectfully submitted,

HENRY E. ASP,

JOHN W. SHARTEL,

Attorneys for Plaintiff in error and Appellant

APPENDIX NO. 1.

"CHAPTER XIV.—CITY INDEBTEDNESS.

"ARTICLE I.—GUTHRIE, EAST GUTHRIE, WEST GUTHRIE AND CAPITOL HILL.

"Be it Enacted by the Legislative Assembly of the Territory of Oklahoma: (Took effect Dec. 25, 1890.)

"Section 1. That the district judge of Logan County is hereby empowered to appoint three disinterested persons to act as a commission or referees to inquire into and pass upon all claims and demands of every character heretofore issued by the city governments mentioned in the caption of this act, for all purposes.

"Sec. 2. That the owners and holders of any kind of scrip, warrants or other evidence of indebtedness heretofore issued by the city governments of Guthrie, East Guthrie, West Guthrie and Capitol Hill, shall present their claims to the commissioners or referees, to be appointed by the district judge, under oath, stating that the same is a bona fide claim, that they performed the labor or advanced the money or furnished the materials or purchased same for a valuable consideration, and that they believe the city, issuing the same did so for necessary expenses incurred in running the city government, and said

master shall hear further evidence if he deem necessary before allowing the same.

"Sec. 3. The commission or referees shall keep a record of all claims filed with them for allowance and keep their office open during the hours of nine o'clock in the morning and four o'clock p. m., and shall be allowed sixty days to hear and determine all claims, or longer if the district judge so orders. Said commission or referees shall immediately after this appointment extend ten days notice in some newspaper published in the village of Guthrie, notifying all parties holding or owning any claims mentioned in this act to present the same to them for allowance; and all persons who fail to present their claims within thirty days from date of first publication mentioned in this section shall be forever precluded from so doing hereafter.

"Sec. 4. That after the commission or referees shall have passed upon and allowed any and all claims mentioned in this act, they shall make a report to the district court of same showing the names and amounts allowed by them, and also all claims and the names of persons and amounts disallowed by them, for approval or disapproval of the district judge. And all claims allowed and approved by the district judge shall be certified to the mayor and council of the village of Guthrie, who are hereby authorized and directed to issue warrants upon the village and payable by the villages to the holders and owners,

payable in installments each of the amounts to be in one, two, three, four and five years to bear interest at the rate of six per cent. per annum from the date of the allowance by the commission or referees, and said mayor and council of the village of Guthrie shall levy a tax upon the property of the residents of said village to pay the warrants herein referred to, levying same upon each subdivision heretofore constituting Guthrie, East Guthrie, West Guthrie and Capitol Hill according to the amount of indebtedness created by the city councils, the mayors and school boards, heretofore acting for and in behalf of the people resident of said cities. Each of said cities to be liable for and taxable under this act for the amount of indebtedness created by them.

"Sec. 5. The said commission or referees shall be allowed such compensation as the district judge may allow them for the services to be performed by them under this act, and the village of Guthrie shall pay the same to the said commission or referees upon the order of the district judge.

"That this act take effect and be in force from and after its passage and approval."

APPENDIX NO. 2.

THE CITY OF GUTHRIE vs. W. D. WYLIE, ET AL.

June Term 1896.

Filed September 4, 1896.

1. PROVISIONAL CITY—NO LAWFUL AUTHORITY POSSESSED BY:—The so-called provisional city of Guthrie was not a *de jure* nor *de facto* municipal corporation, and had no power to contract or bind itself or others, and its *de facto* or *de jure* successor or successors cannot be held liable upon its contract or for its torts.

2. MUNICIPAL CORPORATIONS—LEGISLATIVE AUTHORITY FOR:—Prior to May 2, 1890, there was no law in the Territory of Oklahoma authorizing the creation or existence of municipal corporations. Where there is no law authorizing *de jure* municipal corporations a *de facto* corporation cannot exist. Municipal corporations can only exist under and by virtue of legislative enactment. 1 Okla. 293.

3. ORGANIC ACT—*DE FACTO* CORPORATIONS:—The Organic Act of May 2, 1890, made provision for the organization of Municipal corporations adopting and extending the Statutes of Nebraska over this Territory. The passage of said act did not *eo instanti* convert the provisional government of the city of Guthrie into a *de facto* municipal corporation. The provisions in said statute relating to the organization of villages requiring a majority of the taxable inhabitants of such village to present a petition to the county commissioners of the county, praying that they may be incorporated into a village, designating the name they wish to assume and the metes and bounds of the proposed village and requiring said commissioners to enter an order of incorporation upon their records designating the metes and bounds thereof and declaring the said proposed vil-

lage incorporated, and appointing trustees therefor, were conditions precedent to the vesting of any municipal authority in such village corporation. The inhabitants of the so-called provisional city of Guthrie, having failed until the first of August, 1890, to attempt to comply with these conditions, did not, before that date, become a corporation *de jure* or *de facto*. To establish a corporation *de facto*, the existence of a law authorizing its formation; proceedings taken for that purpose, professed compliance with the law, and acts of subsequent user are essential. A *de facto* corporation is one where the proceedings for its organization are irregular or defective when by regularity of proceedings to incorporate, it might be one *de jure*.

(Syllabus by the Court.)

ERROR FROM THE DISTRICT COURT OF LOGAN COUNTY, before Frank Dale, District Judge.

Bayard T. Hainer, for plaintiff in error.

Keaton & Cotteral, for defendant in error.

The facts are stated in the opinion.

TARSNEY J.: The facts presented in this record necessary to be stated are: That on the 22nd day of April, 1889, the townsite of the present city of Guthrie, in this Territory, was settled upon by townsite settlers; that by a popular vote the people living on said townsite in November, 1889, attempted and assumed to establish and organize a municipal city government. That they went through the forms of electing and qualifying a mayor, council clerk, treasurer and other officers common to a city government. That the persons assuming to be such

officers performed the duties usually incident to the authorities of a municipal corporation; assumed to pass ordinances, keep records, etc., used a corporate seal, and was known as a 'Provisional City Government.' No distinction is shown between this organization and an ordinary city government, except that it is not assumed that it was organized by any legal authority, or under any statute or legislative grant. This provisional government, during its existence, assumed to pass ordinances, resolutions, etc., and to perform the usual functions, executive, legislative and judicial of an ordinary lawful city government, until about August 1, 1890. That on or about the fourth day of December, 1889, the common council, mayor and city clerk of said provisional government, undertook, by ordinance, to grant to W. D. Wylie, F. A. Willman and A. Devereaux the privilege of constructing, maintaining and operating a street railroad or street railroads in said provisional city. One of the conditions of said ordinance requiring the deposit, with the treasurer of said city, by the grantees in said ordinance, of a certain check for the sum of One Thousand Dollars, and that said grantees deposited with said treasurer a check for said amount, drawn on the North Texas National Bank of Dallas, Texas, properly certified. Said check was to become forfeited to said provisional city, should the grantees in said ordinance fail or refuse to comply with certain conditions in said ordinance

specified. That afterwards, by agreement, T. J Oliver and Fred Cullen were associated with the said Wylie, Willman and Devereaux in interest in the rights assumed to be granted by said ordinance, and in said deposited check. That on the 11th day of June, 1890, said check was by the treasurer of said city converted into money and said money was deposited with the treasurer of said city. That on the 13th day of said June, the said common council of said provisional city, by resolution, declared a forfeiture of the rights assumed to have been granted by said ordinance, by reason of an alleged failure upon the part of the grantees therein to comply with the provisions thereof and declared the money drawn on said check to be forfeited to said provisional city. That said council converted and appropriated the said $1,000 of money to the use of the said city, using $300.00 thereof for the purpose of a fire department, and $700.00 for the purpose of a police department.

By the Organic Act of Oklahoma Territory, approved May 2, 1890, certain chapters and provisions of the Compiled Laws of the State of Nebraska, in force November 1, 1889, in so far as applicable, were adopted and extended over the Territory of Oklahoma and put in force therein. These laws of Nebraska, thus made operative in the Territory, provided for the organization of cities of the second class and villages; and under this statute, on or about the 1st of August, 1890, the village of Guthrie was organized

and continued in existence until 1891, when the present city of Guthrie, plaintiff in error, was organized according to the laws of the Territory, enacted by the legislature of said Territory.

Defendants in error commenced this suit in the district court of Logan County to recover the said $1,000 and interest thereon from the present city of Guthrie. On the trial below, the court found for the defendants in error and rendered judgment in their favor for $1,337.70, from which judgment plaintiff in error has appealed to this court. The only assignments of error necessary to be considered are the following:

First. The complaint does not state facts sufficent to constitute a cause of action .

Third. That the decision of the court is contrary to law.

It is unnecessary for us to consider the circumstances of the organization of the so-called provisional government or its action in assuming to grant to the defendants in error the privilege of constructing, maintaining and operating a street railroad, or whether there was any failure or default upon the part of the defendants in error with reference to the conditions of the pretended grant of such right as would justify and authorize the forfeiture of the deposit, made to secure compliance with said conditions; as we must conclude that all and every act of

said provisional government so-called, was without authority of law, there being at the time no lawful authority for its creation or existence. At the time this pretended government was established there was no law authorizing the creation of municipal governments in this Territory, and therefore no power to invest them with any of the functions of government. This so-called provisional government was not even a *de facto* corporation, and had no power or authority to contract or bind itself or others dealing with it. Where there is no law authorizing *de jure* corporations, a *de facto* corporation cannot exist. It is unnecessary for us to elaborate this proposition, as it has already been clearly and definitely determined by this court:

Losey vs City of Guthrie, 1 Okla. 188;

Blackburn vs. Oklahoma City, 1 Okla. 292;

Oklahoma City vs. Richardson Lumber Co., 3 Okla. 5.

A municipal corporation which by law is the successor of another, and which acquires all the property, franchises, rights and improvements, and embraces the same territory, and is composed of the same people as its predecessor, is liable for the valid contracts and legal liabilities of such predecessor.

Blackburn vs. Oklahoma City, Supra;

Broughton vs. Pensacola, 93 U. S. 265;

Mobile vs. Watson, 116 U. S. 289;

Milner's Admr. vs. City of Pensacola, 2 Woods, 632;

O'Connor vs. Memphis, 6 La. 730;

Mt. Pleasant vs. Beckwith, 100 U. S. 514.

New Orleans R. R. Co. vs. City of New Orleans, 26 La., Ann.

A municipal corporation will be held liable for the wrongful conversion of the money or property of a citizen. City of Oklahoma City vs. Richardson Lumber Co., 3 Okla. 5.

It follows from these authorities that if the government of the City of Guthrie, in existence and exercising governmental functions on the 13th day of June, 1890, was a *de jure* government, or even a *de facto* government, and it then converted to its use the one thousand dollars of the moneys belonging to the defendants in error, the liability therefor to said defendants in error was transmitted to its lawful successor, the present city of Guthrie, plaintiff herein, and that said plaintiff in error would be liable to defendants in error therefor.

This court, in the case of Blackburn vs. Oklahoma City cited supra held, that the act of congress approved May 2, 1890, made provision for the organization and existence of *de jure* municipal corporations in Oklahoma and that a provisional government, such as the so-called provisional government of Guthrie city, became and was a *de facto* corporation, from and after that date, and continued to be a *de facto* corporation until it was organized as a village corporation under and by virtue of said laws of the state of Nebraska. If this last authority embodies the correct principle of law, then it is decisive of this case and upon its authority the defendants in error would be entitled to recover. We are not now satisfied that that case correctly stated the principle involved.

The Organic Act of May 2, 1890, adopting certain chapters and provisions of the laws of Nebraska and extending the same over this Territory, made such laws operative from that date; but the record in this case does not show, nor did the record in Blackburn vs. Oklahoma City show that the provisional city government ever took any steps to invoke the powers and authority that might be conferred by those laws, or to incorporate under such laws in the manner or according to the proceedings provided therein for incorporation.

The laws of Nebraska adopted for this territory, did not contain any provision or authority for organ-

izing cities where no corporation had previously existed. Those laws only provided for changing organized villages into cities and organized cities of one class into organized cities of another class; consequently, there was no authority under those laws for organizing any municipal corporation in this Territory, except a village corporation, and the section of the statute relating to the constitution and incorporation of villages, reads as follows:

"Section 40. Any town or village containing not less than two hundred nor more than fifteen hundred inhabitants, now incorporated as a city, town, or village, under the law of this state, or that shall hereafter become organized pursuant to the provisions of this act, and any city of the second class which shall have adopted village government as provided by law, shall be a village, and shall have the right, powers, and immunities hereinafter granted and none other, and shall be governed by the provisions of this subdivision * * * That whenever a majority of the taxable inhabitants of any town or village, not heretofore incorporated, under any law of this state, shall present a petition to the county board of the county in which said petitioners reside, praying that they may be incorporated in a village, designating the name they wish to assume, and the metes and bounds of the proposed village; and if such county board or a majority of the members thereof shall be satisfied that a majority of the taxable inhabitants of the proposed village have signed such petition, and that inhabitants to the number of two hundred or more are actual residents of the territory described in the petition, the said board shall declare the said proposed village incorporated, entering the order of incorporation upon their record, and designating the metes and bounds thereof; and thereafter the said village shall be gov-

erned by the provisions of this act applicable to the government of villages. And the said county board shall, at the time of the incorporation of said village, appoint five persons having the qualifications provided in sec. 42, of this act, as trustees, who shall hold their offices and perform all the duties required of them by law, until the election and qualification of their successors at the time and in the manner provided in this act."

In our opinion, no canon of construction would warrant an interpretation of this section that would make it self-operative. The act does not purport, in any of its provisions, to create villages. It simply authorizes their creation and incorporation by means of machinery it specifies, and in the manner and upon conditions expressly stated. By its terms, the inhabitants of a village, not incorporated, were required to present a petition to the county board, praying that they might be incorporated into a village, designating the name of the village, its metes and bounds; that then and not until then might said board declare the said proposed village incorporated; that they should enter the order of incorporation upon their records; that such order, thus recorded, should designate the metes and bounds of the lands embraced in said village, and that thereafter, only, should said village be governed by the provisions of the act.

The act did not, upon its adoption for this Territory, operate *eo instanti* to breathe the breath of life into municipal corporations whose inhabitants were unenumerated and whose territorial boundaries

were undetermined. Compliance with the statute by filing a petition for incorporation, showing the required number of inhabitants, outlining the district over which the corporation was to exercise powers, praying incorporation, the action of the county board, its declarations of incorporation and its record, were all acts, the performance of which were conditions precedent to the vesting of any municipal authority in the corporation.

Abbott vs. Omaha Smelting Co., 4 Neb. 416;

Childs vs. Hurd, 32 W. Va. 66;

Spencer vs. Cook, 16 La. 163;

Bigelow vs. Gregory, 73 Ill. 197.

If then there was no attempt to incorporate by complying with the requirements of the statute, how could such organization be deemed to be a *de facto* corporation? What is a *de facto* corporation? It must appear to be acting under color of law. The existence of a law authorizing incorporation and mere user will not constitute a corporation *de facto* Thompson on Corporations, sec. 503.

To establish a corporation *de facto*, the existence of a law authorizing its formation, proceedings taken for that purpose in professed compliance with the law, and acts of subsequent user are essential to be shown.

Methodist Episcopal Union Church vs. Picket, 98 N. Y. 482;

Heaston vs. Cin. Ft. Wayne R. R. Co., 16 Ind. 275.

A *de facto* corporation is one where the proceedings for its organization are irregular or defective, when by regularity of proceedings to incorporate, it might be one *de jure*.

It has been held in the state of Nebraska that the filing of articles of incorporation with the county clerk, is a condition precedent to the existence of any corporate franchise; that the law authorizing the incorporation and the articles so filed taken together, are considered in the nature of a grant from the state, and constitute the charter of the company. Abbott vs. Omaha Smelting Co., 4 Neb., 416.

In that case the court held that the effect of a failure to comply with such condition precedent, was that the parties acting in the matter did not bring themselves within the purview of the statute, and that no corporate franchise or corporate powers in any respect existed as to them; that they were not a *de facto* corporation.

In Buffalo R. R. Co. vs. Carey, 26 N. Y. 77, the court says that:

"If the papers filed by which the corporation is sought to be created are colorable, but so defective that in a proceeding on the part of the state against

it, it would for that reason be dissovled, yet by acts of user under such organization, it becomes a corporation *de facto*."

In that case the company had its "papers filed" and therefore acted under a color of franchise.

If the mere continuance of acts begun in usurpation was to confer corporate franchises, why should the statute require a petition from the inhabitants to the county board praying incorporation, which should show the number of inhabitants, the extent and boundaries of the district and require the county board to judicially consider the petition, and declare the incorporation and make a record of their actions, and why should it require all this but as a prerequisite existence?

The general rule is that the existence of a corporation may be proved by producing its charter and showing acts of user under it; but this rule has no application to a corporation founded under the provisions of a general statute, requiring certain acts to be performed before the corporation can be considered in *esse*, or its transactions possess any validity. The existence of a corporation thus formed must be proved by showing a substantial compliance with the requirements of the statutes.

Abbott vs. Omaha Smelting Co. supra.

The right to be considered a corporation and to exercise corporate powers, depends upon the fact

of the performance of the particular acts named in the statute, essential to its corporate existence.

Field vs. Cook, 16 La. 153.

It is said that persons who have contracted in writing with such an association without any color of franchise, are not estopped from denying its corporate capacity.

Welland Canal Co. vs. Hathaway, 8 Wend, 480;

Williams vs. Bank of Michigan, 7 Wend. 539.

The authorities are too numerous to require citation that the doctrine is now settled, that where individuals have associated themselves together under corporate name and assumed to exercise corporate powers, without having complied with the essential requirements made conditions precedent in the statute of incorporation, they are not a corporation *de facto*, but are co-partners.

Applying these rules and the doctrine of the authorities here cited, and while the record in this cause shows that the so-called provisional government of the city of Guthrie, assuming to exercise corporate functions, prior to May 2, 1890, continued the assumption and exercise of such powers until the first day of August, 1890, when they were succeeded by a *de jure* village corporation; that during that time they filed no petition, nor did the inhabitants represented by them, file any petition invoking life

and power from the statute, never made known to the board of county commissioners in any manner the number of inhabitants or the territorial boundaries of the district, never were declared by said county board to be an incorporation, and never claimed or pretended to be acting under authority of the law, or under color of the law, we cannot find that there was any of the elements of a *de facto* corporation; but that the nature and character of the organization remained unchanged, and was the same from a period long prior to said 2nd day of May, 1890, to the first day of August of that year.

We must therefore conclude that on the 13th day of June, 1890, there was no *de jure* or *de facto* municipal corporation existing at Guthrie; that the government or pretended government that received the check and money of the defendants in error and converted said money, was not a *de jure* or *de facto* corporation; that such moneys were converted to the uses and purposes of a police department and fire department for the employment of which there was no authority of law; and that such conversion of the money of defendants in error, did not create a legal liability to them that could be transmitted to any lawful municipal corporation thereafter organized under the law.

It follows that the rule of law upon this proposition was not correctly stated in Blackburn vs. Oklahoma City, 1 Okla. 292, and that the present city of Guthrie is not liable to defendants in error for the

moneys sued for; that the court below erred in rendering judgment in favor of the defendants in error and against the plaintiff in error.

The judgment of the court below is therefore reversed, and this cause dismissed.

All the justices concur, except Dale, C. J., who tried the case below, and Bierer, J., who was of counsel in the cause, not sitting.